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9 Christopher Clark and RS Investments

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

KETAN DESAI,  
v.  
CHRISTOPHER CLARK and RS  
INVESTMENTS,  
Defendants.

Case No. C11-01809 DMR

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS CHRISTOPHER CLARK  
AND RS INVESTMENTS' MOTION TO  
DISMISS**

Date: July 28, 2011  
Time: 11:00 a.m.  
Judge: Magistrate Donna M. Ryu

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Defendants Christopher Clark and RS Investments (collectively “Defendants”), through its undersigned counsel, submit this Brief in Support of Defendants’ Motion to Dismiss.

## **I. ISSUES TO BE DECIDED**

Defendants move to dismiss under Federal Rule of Civil Procedure 12(b)(6). Plaintiff, after a couple of attempts, has failed to plead the elements of defamation. Defendants seek to dismiss on the grounds that the statements on which Plaintiff sues for defamation are not, as a matter of law, defamatory. Defendants also seek to dismiss on the grounds that Plaintiff has failed to plead all elements necessary to state a *prima facie* case of defamation.

## II. FACTUAL BACKGROUND

## A. Procedural History

This case already has a long and tortured procedural history.

On or about July 1, 2009, Plaintiff, proceeding *pro se*, initiated this action by filing a Complaint in the Eastern District of Pennsylvania against Defendants Christopher Clark and RS Investments, alleging defamation on Defendants' part, purported to have occurred during an Internet blog exchange between the parties on a financial news website (the "First Complaint"). Plaintiff filed a faulty proof of service with the Eastern District of Pennsylvania which resulted in a motion to quash service of process and an Order To Show Cause why the matter should not be dismissed for lack of prosecution. Plaintiff responded with several *ex parte* communications to the Eastern District of Pennsylvania, none of which were posted on the Court's docket. On or about July 6, 2010, Plaintiff served Defendants with another document purported to be a Complaint (the "Second Complaint") which differed in substance from the First Complaint. The Second Complaint did not seem to have been filed and did not appear on the Eastern District docket.

After the death of Thomas M. Golden of the Eastern District of Pennsylvania, the case was reassigned to the Honorable Norma L. Shapiro of the Eastern District of Pennsylvania. On or about August 20, 2010, Judge Shapiro entered an Order instructing Plaintiff to advise the Court in writing on or before August 31, 2010 as to whether Plaintiff intended to proceed with this action. By letter dated August 24, 2010, Plaintiff informed the Court that he did intend to proceed with

1 this matter. Despite Plaintiff's questionable attempts at service, in light of Plaintiff's August 24,  
 2 2010 letter, Defendants filed a Motion for a More Definite Statement on September 1, 2010 so  
 3 that Defendants could properly assess Plaintiffs claims and determine whether Plaintiff  
 4 appropriately alleged jurisdiction and/or asserted a valid cause of action against Defendants. On  
 5 September 14, 2010, Judge Shapiro entered an Order granting Defendants' Motion for a More  
 6 Definite Statement, directing Plaintiff to file an Amended Complaint on or before October 4,  
 7 2010.

8 Plaintiff thereafter filed a document titled Response to Brief Regarding More Definite  
 9 Statement, an odd title given that issue of a more definite statement had already been ruled upon  
 10 by the Court, wherein Plaintiff appeared to attempt to assert his allegations against Defendants in  
 11 more detail. By correspondence dated October 18, 2010, Judge Shapiro informed the parties that  
 12 Plaintiffs Response to Brief Regarding More Definite Statement (hereinafter "Amended  
 13 Complaint") was to be treated as Plaintiffs Amended Complaint. This "Response" document,  
 14 with a docket date of September 30, 2010, was thus treated as the operative complaint in this  
 15 action, and remains so.

16 On November 8, 2010, Defendants moved to dismiss Plaintiff's Amended Complaint.  
 17 Defendant's first ground for the motion was lack of personal jurisdiction in Pennsylvania over  
 18 Defendants. Defendants also moved to dismiss for failure to state a claim. Judge Shapiro granted  
 19 the motion to dismiss, finding no personal jurisdiction and ordering the case transferred. The  
 20 Court did not reach whether the Amended Complaint stated a claim.

21 The case has now been transferred to the Northern District of California.

22 **B. Statement of Facts**

23 In Plaintiff's Amended Complaint (the September 30, 2010 Response), the allegations of  
 24 which Defendants accept as true for purposes of their Motion to Dismiss only, Plaintiff contends  
 25 that he is a board certified internist and rheumatologist with a consulting business with  
 26 biotechnology, pharmaceutical, and financial companies as his clients. Amended Complaint  
 27 § 3(a). Plaintiff alleges that in this capacity he writes articles for the online financial website  
 28 SeekingAlpha.com, a premier and reputed online financial news site frequented by financial

1 analysts, money managers, executives from respective industries, and individual investors.

2 Amended Complaint § 3(a).

3 Plaintiff contends that on May 13, 2008, an article written by Plaintiff was published on  
 4 SeekingAlpha.com wherein Plaintiff stated a drug named Flurizan, developed for Alzheimer's  
 5 Disease by Myriad Genetics, would fail in its phase III pivotal trials. Amended Complaint § 3(b).  
 6 Plaintiff further stated in said article that he had shorted shares of Myriad Genetics at \$55/share.  
 7 Amended Complaint § 3(b). Plaintiff contends that, on June 30, 2010, Myriad Genetics  
 8 announced that Flurizan had failed, prompting Plaintiff to write another article wherein he stated  
 9 that he "did not think the burn rate (i.e. company expenses) would go down substantially."  
 10 Amended Complaint § 3(c). Plaintiff next maintains that, in response to his articles, defendant  
 11 Christopher Clark ("Clark") of Defendant RS Investments commented on the website and  
 12 misrepresented Plaintiff's position on two accounts, by: (1) stating that Plaintiff had advised  
 13 shorting Myriad Genetics' stock at \$41, when in fact Plaintiff had done so at \$55; and (2) stating  
 14 that Plaintiff was skeptical about Myriad Genetics becoming profitable, when in fact Plaintiff  
 15 wrote that he was skeptical that the burn rate would go down significantly since most of the  
 16 Flurizan expenses had already taken place, and that there was a pipeline of compounds being  
 17 developed that would still require expenses. Amended Complaint ¶¶ 3(d) and (e). Plaintiff  
 18 apparently infers these purported misrepresentations from the following comment allegedly  
 19 written by Clark:

20 Being right or making money. On May 13th (when you told us so) the stock  
 21 closed at \$41.25. After the negative news it never broke below \$45. How exactly  
 22 did you make money on this put trade again? And you doubt the rationale that  
 23 they will be profitable in FY09? They are roughly break even right now and have  
 24 substantial net outstanding losses. The diagnostics business is hugely profitable  
 25 (45% operating margins when not spending on their DTC campaign, 40% when  
 26 they are) and growing rapidly. When you have sustainable revenue, cut spending  
 27 on dead programs and pay no taxes, that falls to the bottom line. \$60mm/45mm  
 28 shares = \$1.33 from cutting that program alone. Nothing in their pipeline warrants  
 a trial near the scale that they undertook with Flurizan -- that spend level is not  
 coming back. Stick with collecting degrees, Doc. Maybe try English next -- one  
 datum leads but many data lead.

Amended Complaint ¶ 3(d). Plaintiff contends Clark's statements in this regard constitute  
 libel and slander. Amended Complaint ¶ 3(e).

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1           Additionally. Plaintiff alleges that Clark's "gratuitously insulting language and  
 2 denigration of [Plaintiff's] education has caused great damage to [his] reputation." Amended  
 3 Complaint ¶ 3(f). Plaintiff further contends that Clark "asked the website to delete [his]  
 4 rebuttals," thereby leaving Plaintiff with no forum to respond to Defendant Clark's comments.  
 5 Amended Complaint ¶ 3(g). In response to Defendants subsequent efforts to address Plaintiffs  
 6 concerns, Plaintiff states that Defendants characterized the dispute as "a difference of opinion"  
 7 when it was rather a "mischaracterization of someone's position." Amended Complaint ¶ 3(h).  
 8 Finally, Plaintiff asserts that Defendants further slandered him when Mr. Benjamin Douglas  
 9 called him a "delusional egomaniac" in an email to employees of RS Investments. Amended  
 10 Complaint ¶ 3(i).

11           As a result of the above alleged conduct, Plaintiff purports to have sustained damages in  
 12 that (1) his "consulting income has dropped by more than \$200,000," although admittedly not all  
 13 due to Defendant Clark's comments, and (2) he was denied a grant of \$150,000 for clinical  
 14 studies where "one of the comments related to the dispute at hand." Amended Complaint ¶¶ 5(a)  
 15 and (b). Plaintiff's Amended Complaint also seeks punitive damages.

16 **III. ARGUMENT**

17           Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted and  
 18 therefore must be dismissed. When reviewing a motion to dismiss filed pursuant to Federal Rule  
 19 of Civil Procedure 12(b)(6), the complaint must be viewed in the light most favorable to the  
 20 plaintiff and all its well-pleaded allegations must be accepted as true. *Erickson v. Pardus*, 551  
 21 U.S. 89, 93-94, 127 S.Ct. 2197 (2007). Where a plaintiff has asserted a cognizable legal theory of  
 22 recovery -- in this case, defamation -- a defendant may move to dismiss based on the absence of  
 23 sufficient facts to support the legal theory. *Shroyer v. New Cingular Wireless Services, Inc.*, 622  
 24 F.3d 1035, 1041 (9th Cir. 2010). A court must determine whether the complaint alleges "enough  
 25 facts to state a claim to relief that is plausible on its face." *Bell Atlantic Cop. v. Twombly*, 550  
 26 U.S. 544, 556-57 (2007). A claim has facial plausibility when the plaintiff pleads factual content  
 27 that allows the court to draw the reasonable inference that the defendant is liable for the  
 28 misconduct alleged. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

1                   **A. The Court Should Determine Whether The Alleged Statements Can Be**  
 2                   **Defamatory**

3                   Plaintiff's defamation claim is a state law claim. Plaintiff states that California law  
 4 applies, although the action was initially filed in Pennsylvania. Because the substantive law of  
 5 defamation is similar in both jurisdictions, the choice of which state's law to apply should not be  
 6 significant to resolution of this case.

7                   To state a claim for defamation, a plaintiff must plead (a) publication that is (b) false, (c)  
 8 defamatory, and (d) unprivileged, and that (e) has a natural tendency to inspire or that causes  
 9 special damage. Cal. Civ. Code § 45, 46; *Smith v. Maldonado*, 72 Cal. App. 4th 637, 645 (1999);  
 10 *see also* S. Witkin, *Summary of California Law*, § 529.<sup>1</sup>

11                  Before a defamation case can proceed, the Court must make the important determination  
 12 of whether the statements as issue, if proven, can be defamatory, *i.e.*, an injurious statement of  
 13 fact rather than an opinion or a statement that is clearly hyperbolic, satirical, imaginative or  
 14 rhetorical. *See Baker v. Los Angeles Herald Examines*, 42 Cal. 3d 254, 260-61 (1986). “[P]ure  
 15 statements of opinion should not be actionable.” *James v. San Jose Mercury News, Inc.*, 17 Cal.  
 16 App. 4th 1, 12 (1993). The Court must make the threshold determination of “whether statements  
 17 contain provable false factual assertions and whether they would reasonably be understood as  
 18 assertions of fact as opposed to hyperbole, or loose figurative expression.” *Weller v. American*  
 19 *Broadcasting Companies, Inc.*, 232 Cal. App. 3d 991, 1002 n.9 (1991).<sup>2</sup>

20                  **B. The Statements By Defendant Clark Are Not Defamatory As A Matter Of**  
 21                  **Law**

22                  The alleged defamatory statement is the post by Defendant Clark on the SeekingAlpha

23                  <sup>1</sup> For the elements of defamation under Pennsylvania law, see *Beverly Enterprises, Inc. v. Trump*, 182 F.3d 183, 187 (3d Cir. 1999) (citing 42 Pa.C.S. § 8343(a)). Before a defamation  
 24 action moves forward, “[i]t is the function of the court to determine whether the challenged  
 25 publication is capable of a defamatory meaning.” *Thomas Merton Ctr. v. Rockwell Int'l Corp.*,  
 26 442 A.2d 213, 215-16 (Pa. 1981). .. The Pennsylvania Supreme Court has held that “[i]t is not  
 27 enough that the victim of the [statements] . . . be embarrassed or annoyed, he must have suffered  
 28 the kind of harm which has grievously fractured his standing in the community or respectable  
 society.” *Id.* (quoting *Scott-Taylor, Inc. v. Stokes*, 425 Pa. 426, 229 A.2d 733, 734 (1967)).

2                  <sup>2</sup> Pennsylvania law requires the same threshold determination by the Court. *Kryeski v. Schott Glass Techs.*, 626 A.2d 595, 601 (Pa. Super. 1993), appeal denied, 639 A.2d 29 (Pa.  
 1994).

1 website as quoted by Plaintiff in the Amended Complaint. Amended Complaint ¶ 3(d) (see page  
 2 3, *infra*).

3 **1. Clark's Post Is A Disagreement With Plaintiff Regarding Investment  
 4 Advice, Not Defamation**

5 The statements made by Defendant Clark in the SeekingAlpha post are statements of  
 6 opinion that cannot be proven true or false. To be defamatory, statements must be subject to  
 7 being “reasonably interpreted as stating actual facts.” *Milkovich v. Lorain Journal Co.*, 497 U.S.  
 8 1, 2 (1990).

9 The dispositive question for the court is whether a reasonable fact finder could  
 10 conclude that the published statements imply a provable false factual assertion.

11 *Moyer v. Amador Valley Joint High School Dist.*, 225 Cal. App. 3d 720, 724 (1990).

12 The *Moyer* case involved a student newspaper that published an unflattering article about  
 13 the plaintiff, a teacher at the school. The allegedly defamatory statements were: (1) “Students  
 14 terrorize [the plaintiff];” (2) “[the plaintiff] is a babbler;” and (3) “he is the worst teacher at [the  
 15 school].” The court sustained the defendant’s demurrer on the grounds that the foregoing  
 16 statements could not be considered defamatory. *Id.* at 725. The Court of Appeal affirmed the  
 17 court held that the “worst teacher” statement was not “capable of being proved true or false.” *Id.*  
 18 “Clearly, the statement is an expression of subjective judgment by the speaker.” *Id.* The  
 19 statement, in context, was also “simply an expression of anger or disgust.” *Id.* Similarly, calling  
 20 the plaintiff a “babbler” was an “exaggerated expression conveying the student-speaker’s  
 21 disapproval of plaintiff’s teaching or speaking style.” Finally, the use of the term “terrorize” was  
 22 an “exaggeration of the actual event,” “falling within the protectable category of rhetorical  
 23 hyperbole.” *Id.* at 726.

24 Dissecting Defendant Clark’s SeekingAlpha post, there is no statement of fact that  
 25 is injurious to Plaintiff and provably true or false.

26 • “How exactly did you make money on this put trade again?”

27 This is framed as a question, although it indicates that Clark questioned Plaintiff’s  
 28 investment opinions. Suggesting that Plaintiff was giving poor advice on a dollar value at which  
 to short a stock is a difference of opinion, not a statement of fact.

- “And you doubt the rationale that they will be profitable in FY09? They are roughly break even right now and have substantial net losses . . .”

The bulk of the post is Clark stating his grounds for disagreeing with Plaintiff regarding the business prospects for Myriad Genetics. Again, these are disagreements of opinion, not factual assertions demonstrably true or false.

- “Stick with collecting degrees, Doc. Maybe try English next -- one datum leads but many date leads.”

Again, this is not a factual statement. The statement may be insulting but like with the “babble” and “worst teacher” insults in *Moyer*, the statement is “rhetorical hyperbole,” not defamation. The statements of Clark on their face appear to be nothing more than a gratuitous criticism of the opinion of another.

**2. To The Extent That Clark's Post Might "Mischaracterize" Plaintiff's Previous Statements, Such A "Mischaracterization" Is Not Defamatory**

In the Amended Complaint, Plaintiff contends that the post by Clark “misrepresented” Plaintiff’s “position.” In other words, the act of defamation is misstating someone else’s opinion. As a threshold matter, it is unclear that mischaracterizing someone else’s opinion is a potentially defamatory statement of fact. Plaintiff alleges two “mischaracterizations” of his opinion by Clark:

- [Clark] stated that I had advised shorting MYGN at 41, when in fact I had done so at 55.
- [Clark] stated that I was skeptical about Myriad Genetics becoming profitable, when in fact wrote that I was skeptical that the burn rate would go down significantly since most of the Flurizan expenses had already taken place, and that there was a pipeline of compounds being developed that would still require expenses

Amended Complaint § 3(d) and (e). Because Plaintiff quotes the Clark post in his pleading, the Court can look at the actual statement and see that Clark has not stated a price at which Plaintiff supposedly advised shorting the stock.

1           The second “mischaracterization” above, as alleged by Plaintiff, is not a misrepresentation  
 2 of any kind because it is a distinction without a difference. Plaintiff is clearly critical of the  
 3 prospects for Myriad Genetics -- he has advised investors to short the stock. Plaintiff only takes  
 4 issue that Clark did not precisely restate in his own post the reasons Plaintiff had previously  
 5 stated for being pessimistic about the company. The gist is exactly the same and there is no  
 6 meaningful “mischaracterization” by Clark.

7           By stating that the stock price closed at \$41.25 on May 13th, and asking “how exactly did  
 8 you make money on this put trade again?,” to a member of the public reading the post, Clark is  
 9 questioning Plaintiff’s advice. Plaintiff contends that the foregoing statement is a  
 10 mischaracterization of the price at which Plaintiff had advised shorting the stock. Even if a finder  
 11 of fact could infer that Clark misrepresented Plaintiff’s previous opinion as to a good price at  
 12 which to short a stock, such a “misrepresentation” would not be defamatory. Such  
 13 “mischaracterizations of someone’s position” (Amended Complaint ¶ 3(i)) in no way expose  
 14 Plaintiff to hatred, contempt, or obloquy. *See Oberkotter v. Woolman*, 187 Cal. 500, 504 (1921).  
 15 Nor would such a mischaracterization be a statement that “tends directly to injure [Plaintiff] in  
 16 respect to his office, profession, trade, or business that has a natural tendency to lessen its  
 17 profits,” or “by natural consequences, causes actual damages.” Cal. Civ. Code § 46. Plaintiff  
 18 essentially is contending that he is a paid financial industry blogger, and that one post criticizing a  
 19 previous blog entry has caused grievous harm to him. The Court, as a matter of law and sound  
 20 public policy, should not enter this fray and leave this “flaming” right where it belongs -- on the  
 21 SeekingAlpha website, where both Plaintiff and Clark may continue to exercise their First  
 22 Amendment rights and voice their opinions about a company’s business prospects, appropriately  
 23 limited by the website or internet service provider rules regarding conduct of participants in the  
 24 forum.

25           C.    **The Statements Of Defendant RS Investments’ General Counsel Are Not**  
 26           **Defamatory**

27           The only actual statement of the other defendant, RS Investments,<sup>3</sup> as alleged by Plaintiff,

28           <sup>3</sup> By addressing this allegation by Plaintiff, Defendants do not waive the attorney-client  
 privilege. Plaintiff does not attach the actual communication by Douglas, which the Court could

1 is that the general counsel of RS Investments, Ben Douglas, called Plaintiff a “delusional  
 2 egomaniac.”<sup>4</sup> This statement is not defamatory because it is not provably true or false. It is  
 3 simply a statement of opinion. Even if hurtful and vitriolic, it is only an opinion, such as the  
 4 “babbler” and “worst teacher” comments that were not actionable as a matter of law in the *Moyer*  
 5 case. 225 Cal. App. 3d at 725.

6 **D. Plaintiff Has Not Alleged All Elements Of Defamation**

7 Moreover, while Plaintiff arguably alleges some of the elements necessary to support a  
 8 cause of action for defamation, his Amended Complaint fails to allege all required elements.  
 9 Specifically, Plaintiff’s Amended Complaint fails to state with particularity the recipients of the  
 10 alleged defamatory comments by Defendants, fails to state that any recipients understood the  
 11 remarks to be a reference to Plaintiff, and most significantly fails to allege either that the  
 12 statements have a natural tendency to injure or caused special damage. *Duste v. Chevron*  
 13 *Products Co.*, 738 F. Supp. 2d 1027, 1041 (N.D.Cal. 2010). Plaintiff contends that he sustained  
 14 damages in two forms: (1) his consulting income dropped by more than \$200,000, a drop Plaintiff  
 15 does not claim “to be all due to [Defendant] Clark,” but rather that he claims merely “had a not  
 16 insignificant effect;” and (2) he was denied a \$150,000 grant from the National Institutes of  
 17 Health for clinical studies “and one of the comments related to the dispute at hand.” Amended  
 18 Complaint ¶¶ 5(a) and (b). These could be considered “actual damage” under Civil Code section  
 19 46, but Plaintiff has not alleged how Clark’s post could have caused such damages. For example,  
 20 Plaintiff does not allege the identity of the persons who denied him the NIH grant and that those  
 21 persons read Clark’s post and denied the grant because of it. Accordingly, Plaintiff’s Amended  
 22 Complaint fails to state a claim upon which relief may be granted and therefore must be  
 23 dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

24 **IV. CONCLUSION**

25 For the foregoing reasons, Defendants respectfully request that this Honorable Court  
 26 dismiss Plaintiffs Amended Complaint for lack of personal jurisdiction and/or for failure to state a

27 see should be considered attorney-client privileged.

28 <sup>4</sup> Plaintiff has not even identified RS Investments correctly.

1 claim on which on which relief may be granted.

2 DATED: June 16, 2011

3 SHARTSIS FRIESE LLP

4

5 By: /s/ Robert Charles Ward  
6 ROBERT CHARLES WARD

7 Attorneys for Defendants  
8 CHRISTOPHER CLARK AND RS  
9 INVESTMENTS

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